No. 80-807

IN THE

Supreme Court of the United States

October Term, 1980

HERSCHEL BLUMBERG, *et al.*
Petitioners,

v.

PRINCE GEORGE'S COUNTY, MARYLAND, *et al.*
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the decision of Maryland's highest court dismissing the instant civil action for failure to exhaust statutorily prescribed administrative remedies, consistent with Maryland law, constitutes an adequate state ground of decision rendering further review by this Court unnecessary.

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JURISDICTION

Respondents submit that this case provides no ground on which to invoke the jurisdiction of this Court.

CONSTITUTIONAL PROVISIONS STATUTES AND ORDINANCES

Listed below are citations to statutes and ordinances respondents believe are relevant to a consideration of the Petition for Certiorari. Because of their length, respondents would refer the Court to the text as set forth in the petitioner's Appendix at pages 296-313. Section 2-117, Code of Prince George's County, (1972), which is *not* included in the Appendix, is set forth verbatim below.

Statutes:

	Petitioners' App.
Article 25 A, Section 5(U), Maryland Annotated Code (1957, 1973 Repl. Vol.)	297

Ordinances:

Article X, Section 1013, Prince George's County Charter	312
Section 4-242, § 128.1 and 128.2, Code of Prince George's County, (1972)	313
Section 4-230, Code of Prince George's County, (1972)	312

Code of Prince George's County, (1972):
Section 2-117.
Board of Administrative Appeals.

> There is created a Board of Administrative Appeals for the County, to hear and determine all administrative appeals allowed by ordinance

or law, with the exception of appeals under Section 27-460 of the Zoning Ordinance and appeals from decisions of the Personnel Board which shall be heard by the Circuit Court for the County and appeals by owners or occupants of multi-family rental facilities from decisions and order of the Director of the Department of Licenses and Permits as to the interpretation, application, and enforcement of the Landlord-Tenant Commission.
(Gen. Reso. No. 2-1968, § 2; as amended by Bill No. CB-15201972. 11/27/72.)

STATEMENT OF THE CASE

Respondents respectfully call the Court's attention to the following facts which should be considered in addition to those presented in Petitioners' Statement:

The Blumbergs' application for a building permit was never amended to show that the Blumbergs were licensed Residential Building Contractors. Therefore an inspection of this application by the Building Inspector on April 12, 1973, would not indicate that the contractors, the Blumbergs, were licensed Residential Building Contractors. More importantly, when the Blumbergs commenced construction on March 29, 1973, they were aware of the requirement for a Residential Building Contractor's license, and were also aware that they did not have such a license.

The initial suspension of the Blumbergs' plumbing permits by the WSSC was based on information it had received from an aide to the County Executive that the County would be invalidating the building permit. (As noted by the Court of Appeals of Maryland, it was the

normal practice of the County to notify the WSSC of the withdrawal of building permits.) (Petitioner' App. 8) However, on May 30, 1973, the WSSC revoked the Blumbergs' plumbing permits on the grounds that they had been erroneously issued by the WSSC and that the WSSC lacked the facilities to handle the new sewage which would be generated by the building.

The law of Prince George's County, Maryland, required that for the Blumbergs to obtain and retain a building permit, they must be in compliance with all other laws, including those pertaining to sewage disposal. If a contractor didn't have a plumbing permit from the WSSC, he couldn't have a building permit from the County. Although the WSSC's suspension of the Blumbergs' permits on April 11, 1973 could arguably be attributed to the County,[1] the WSSC's revocation of the permits on May 30, 1973, was based on reasons peculiar to the structure and operation of the WSSC and totally unrelated to the County. In any event, the County, absent one possible circumstance, was not authorized by its own law to allow the continuation of the Blumbergs' building permits after April 11, 1973.

The only legally prescribed remedy immediately available to the Blumbergs on and after April 12, 1973 and May 30, 1973, was an appeal to the Board of Appeals, which was empowered by County Ordinance to vary any provision of the subtitle dealing with building permits when enforcement would do manifest injustice, and/or would be contrary to the spirit of the law or the public interest, or when in the Board's opinion the Building Inspectors interpretation of the law should be modified or re-

[1]It has been the County's position throughout these proceedings that it cannot be liable for any action of the WSSC, an agency of the State of Maryland, which is not, as a matter of law, under the control of the County. *Katz v. WSSC,* 284 Md. 503, 397 A.2d 1027 (1979).

versed.[2] Hence, the Board of Appeals was empowered, in the exercise of its discretion, to order the County to reissue the Blumbergs' building permits absent the Residential Building Contractors license required by the County law and even absent the plumbing permits required by the WSSC Code. The Blumbergs, however, never noted an appeal to the Board of Appeals.

Rather, in July 1973, the Blumbergs filed a Bill of Complaint in the Circuit Court for Prince George's County seeking injunctive relief against the County in the form of reissuance of the building permits. Much later, in October 1976, the Blumbergs amended the Bill of Complaint to seek monetary damages which were alleged to have accrued as a result of the delay attendant to completion of the project.[3] As it was not until 3½ years after they lost their building permit that the Blumbergs sought damages, there is no genuine issue of a concurrent right of action for damages at the time the Blumbergs were obliged to exhaust their administrative remedies, i.e., April-May 1973.

Contrary to the assertion in Petitioners' Statement of the case, there was no specific finding of malice by the trial court on the part of respondent Gullett, in fact the absence of such a finding was a basis of respondents' initial appeal of the trial court's decision.[4] Also contrary to the assertion

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[2]Code of Prince George's County, Maryland, Sec. 4-242, Section 128.2 (1972).

[3]In discussing the delays attendant to this litigation the Court of Appeals of Maryland noted that despite Petitioners' request for a speedy resolution of the issues, the case was not tried until five years after its institution, and petitioners nine times sought suspension of the Maryland Rule of Procedure providing for dismissal of a case for non-prosecution. (Petitioners' App. 12).

[4]Under Maryland law a public official, i.e., the County Executive, is immune from tort liability for non-malicious acts. *Bradshaw v. Prince George's County, Maryland,* 284 Md. 294, 396 A.2d 255 (1979). Article X, § 1013, Prince George's County Charter.

of petitioners that their remedy before the Board of Appeals was doubtful or inadequate is the absence in the record of any evidence to indicate that the Board of Appeals would not have reviewed their appeal impartially, and the legislation cited in petitioners' appendix[5] indicates that the Board of Appeals could have furnished the Blumbergs precisely the relief they sought in the Circuit Court, i.e., return of their building permits.

REASON FOR DENYING THE WRIT

The Court of Appeals of Maryland ruled that the trial court should not have assumed jurisdiction over the case as the Blumbergs had failed to exhaust their exclusive, statutorily prescribed administrative remedy to protest the County's action in regard to their building permits. While the Blumbergs have argued in support of their Petition for Writ of Certiorari that the applicable sections of the Prince George's County Code did not allow them to appeal the actions of the Building Inspector to the Board of Appeals of Prince George's County, Maryland, the Court of Appeals of Maryland has stated that as a matter of Maryland law, such an appeal was allowed.[6] Petitioners cannot, therefore, argue that the administrative remedy was doubtful, unknown, or inadequate, as the Court of Appeals has in its opinion delineated the procedures which were available and stated that these procedures are ex-

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[5]Code of Prince George's County, Maryland, Sec. 4-242, Sec. 128.2 (1972). (Petitioners' App. 313).

[6]The statutes establishing this remedy are Article 25A, § 5(U), Maryland Annotated Code (1957, 1973 Repl. Vol.); Section 2-117, Code of Prince George's County (1972); Section 4-242, § 128.1 and 128.2, Code of Prince George's County (1972) and Section 4-230, § 101.2, Code of Prince George's County (1972).

clusive and mandatory. The Blumbergs seek to rely on the exception to the doctrine of exhaustion of administrative remedies that exists when the administrative agency cannot provide a remedy. They did not argue below that the scheme of appeal provided by the County's ordinances is unconstitutional and may not assert such a challenge now for the first time.[1] The Blumbergs claim really breaks down into a complaint as to the application of a valid statutory scheme of administrative appeal to a particular situation, which is not sufficient grounds to ignore the requirement that administrative remedies be exhausted before resort to the courts is allowed. *Harbor Island Marina v. Calvert Co.*, 285 Md. 303, 308, 407 A.2d 738 (1970). However, the opinion of the Court of Appeals, being the definitive statement of Maryland law on the issue of availability of an administrative remedy, precludes petitioners from claiming before this Court that no administrative remedy existed.

This Court has previously declined to review cases raising allegations of violation of constitutional rights based on the "adequate state grounds doctrine." This Court stated in *Henry v. Mississippi*, 379 U.S. 443 (1965):

> It is of course, a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds, even where these judgments also decide federal questions. The principle applies not only

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This Court has refused to make an exception to the doctrine of exhaustion of administrative remedies based on assertions of unlikelihood of success before the administrative agency. *Fahey v. Mallonee*, 332 U.S. 245 (1947).

[1] The Court of Appeals expressly noted that the Blumbergs contentions did not include a direct attack upon the legislation creating the administrative remedy. (Petitioners' App. 17-19).

> in cases involving state substantive grounds, Murdock v. City of Memphis, 20 Wall. 590, 22 L.Ed. 429, but also in cases involving state procedural grounds. Compare Herb v. Pitcairn, 324 U.S. 117, 125-126, 65 S.Ct. 459, 462-463, 89 L.Ed. 789 with Davis v. Wechsler, 263 U.S. 22, 44 S.Ct. 13, 68 L.Ed. 143, 397 U.S. at 446.

If the decision is based on state substantive law, this Court has reasoned that since a determination of alleged federal questions would not affect its disposition, review of constitutional issues not addressed below is barred. *Id. Orr v. Orr* ____ U.S. ____, 99 S.Ct. 1102, 1110 (1979). Where the decision below rests on an interpretation of state procedural law, its "adequacy" has been determined in several ways. For example, defaults in state proceedings will prevent review of alleged federal rights if ". . . the State's insistence on compliance with its procedural rule serves a legitimate state interest," or the state rule is a reasonable one clearly announced to the parties and counsel. *Henry v. State of Mississippi, supra,* 379 U.S. at 447, 448. *See also, Michigan v. Tyler,* ____ U.S. ____, 98 S.Ct. 1942, 1951 (1978); *Orr v. Orr, supra,* 99 S.Ct. at 1109. Also, this Court has indicated that adequacy would be found to exist if the state procedural rule is not novel and has been consistently applied by the state court both in the past and in the case at issue. *Sullivan v. Little Hunting Park, Inc.,* 396 U.S. 229, 233-234, 244-245 (1969); *Hammerstein v. Superior Court,* 341 U.S. 491, 492-493 (1951). Finally, this court has indicated that *jurisdictional* procedural default provide more adequate state grounds than non-jurisdicational. *Sullivan v. Little Hunting Park, supra,* 396 U.S. at 233-234; *Parrot v. City of Tallahassee, Florida,* 381 U.S. 129 (1965).

This Court has held that failure to exhaust administrative remedies as required under either federal or state law will bar the Court's review by certiorari of the merits of alleged federal issues. In *Continental & Western Air v. Koppal*, 345 U.S. 653 (1953), this Court dismissed an employee's suit for reinstatement where the Missouri high court had determined that the employee failed to exhaust administrative remedies under his contract as required by Missouri law. Though the Court noted exhaustion might not be required in similar circumstances in another state, the Missouri court's ruling was consistent with previous application of the doctrine in that state.

Likewise, in *Lichter v. United States*, 334 U.S. 742 (1948), this Court refused to review the merits of three petitions for certiorari because of a proper Court of Appeals ruling that the three petitioning companies had failed to exhaust administrative remedies. The companies attempted to secure a redetermination of excess profits charged to them under the Renegotiation Act, but had failed to apply within the required time before the War Contracts Price Adjustment Board and subsequently to the tax court, as required by Congress. This Court excluded from consideration (1) the amount of the profits and other comparable issues which might have been presented to the tax court, (2) and even the issue of whether or not the act covered these contracts in the first place. *Id.* 334 U.S. at 792-793.

The decision of the Court of Appeals of Maryland was a reasonable and consistent application of the State's long established doctrine of exhaustion of administrative remedies.[9] The Court of Appeals detailed the procedures

[9]Among the many Maryland cases which state rule are: *White v. Prince George's County*, 282 Md. 641, 387 A.2d 260 (1978); *Gingell v. Board of County Comm'rs.*, 249 Md. 374, 239 A.2d 903 (1968); *Reiling v. Comptroller*, 201 Md. 384, 94 A.2d 261 (1953).

and remedies to be followed, noting that the legislature had both designated review by the Board of Appeals as the exclusive remedy and provided for appeal of the decision of the Board of Appeals to the Circuit Court and thence to the Court of Special Appeals of Maryland.

This Court and the Maryland Courts have, with consistency, narrowly defined the term "inadequacy of administrative remedy." This Court has held that the "inadequacy" exception is not one of convenience or ready application, but rather, that it requires a strong showing of (1) inadequacy and (2) impending harm incident to delay. *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752, 773, 774 (1974). Here the inadequacy claim has been thoroughly refuted by a consideration of the powers of the Board of Appeals, and the Blumbergs can surely make no valid claim of impending harm incident to delay when they did not file their initial Bill of Complaint until after the time for noting an appeal to the Board of Appeals had run.

The Blumbergs, lastly, have attempted to bootstrap themselves into an exception to the doctrine of exhaustion of administrative remedies by alleging that the actions of the County in regard to their building permit was actionable as an unconstitutional taking of property. This is contradictory to the established law of Maryland that the Courts will not allow a claimant to bypass the administrative process, particularly when judicial review is provided (as was the case here), simply by raising the claim of an unconstitutional taking of property. *Arnold v. Prince George's County*, 270 Md. 385, 311 A.2d 223 (1973); *Gingell v. County Comm'rs., supra; Poe v. Baltimore City*, 241 Md. 303, 216 A.2d 707 (1966); *Bogley v. Barber*, 194 Md. 632, 72 A.2d 17 (1950). This provision

of Maryland law is neither novel nor unreasonable, and its application to the instant case serves the legitimate purpose of preventing the courts from being called upon to decide matters that would never arise if the prescribed administrative remedy was followed. *Gingell v. County Comm'rs., supra.*[10]

CONCLUSION

For the reasons stated, the Writ of Certiorari should be denied.

Respectfully submitted,

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[10]It is not clear from the petition whether or not the Blumbergs seek a review of the Court of Appeals' decision affirming the dismissal of Kelly and Gullett as individual defendants. That decision does not decide or involve any federal issue. The Court of Appeals, Court of Special Appeals and trial court all determined that, as a matter of *substantive* Maryland tort law, neither the Bill of Complaint nor the Amended Bill of Complaint contained sufficient factual allegations to state a cause of action against either defendant. Since the Blumbergs had failed to properly plead their case after two voluminous Bills of Complaint, the trial court exercised its reasonable discretion, as determined by two appellate courts, to dismiss Kelly and Gullett and prohibit further amendment.